APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7586

RESERVE LIFE INSURANCE COMPANY, *Appellant*,

v.

DR. E. H. NORTH, JR., *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA AT ELIZABETH CITY.

(Argued April 8, 1958. Decided April 21, 1958.)

Before SOBELOFF and HAYNSWORTH, *Circuit Judges*, and THOMSEN, *District Judge*.

THOMSEN, *District Judge*:

Plaintiff insurance company appeals from a judgment for defendant doctor in an action for damages based upon defendant's alleged fraud in filling out a physician's hospitalization statement for a patient insured by plaintiff. The district judge heard the case without a jury and filed an opinion, 155 F. Supp. 249.

The insured, John M. Cudworth, was admitted to a hospital in Elizabeth City, N. C., on November 23, 1951, as defendant's patient. He was first seen by defendant on November 14, 1951, after he had complained of a hacking cough and fatigue for some time and had been treated by

another doctor for an upper respiratory infection with some infiltration or congestion in the lungs, which defendant considered to be pneumonia. After the acute stage had passed and the fever had gone, the congestion remained. Defendant thought the condition was probably caused by pulmonary tuberculosis or possibly by bronchogenic carcinoma, so he had Cudworth admitted to the hospital for various tests and laboratory analyses. The tests showed no evidence of tuberculosis, and Cudworth was discharged on December 2, to return in ten days for another x-ray and possible bronchoscopic examination.

On December 2 defendant filled out a physician's hospital statement on a printed form furnished to Cudworth by plaintiff. In answer to the question: "Nature of Sickness or Disease? List all.", defendant wrote: "Pneumonia—Type uncertain"; he stated that in his opinion the cause of the condition had existed one week before he was consulted on November 15, 1951, and answered "No" to the question: "Does history indicate that he has had previous symptoms?" To the question: "To what do you attribute the cause of the disease or condition", he answered "Nothing specific".

Defendant continued to see Cudworth until January, 1952, but since an x-ray showed that the congestion had improved, he did not call for a bronchoscopic examination. In March, 1952, Cudworth was admitted to a hospital in Norfolk, his condition was diagnosed as carcinoma of the lung, and he died of that disease in May 1952.

Plaintiff had issued a Hospital and Surgical Expense Policy to Cudworth on September 21, 1951. It covered hospitalization resulting from sickness the cause of which originated more than fifteen days after the date of issue, except that tuberculosis, cancer, and certain other diseases were covered only if hospital confinement should begin

after the policy had been in force for six months or more. The policy was renewable at the option of the Company only.

Plaintiff claims that as a result of defendant's fraud in filling out the statement on December 2, 1951, it paid out $76.50 for the November hospitalization, renewed the policy in March, 1952, and was forced to pay out $1,643.72 for benefits and costs of defending a suit arising out of the hospitalization in the spring of 1952. It also claims $10,000 punitive damages for gross fraud. Plaintiff contends that defendant falsely and fraudulently, and in reckless disregard for the truth (a) misrepresented to plaintiff the nature and duration of the sickness or disease for which Cudworth had been hospitalized and treated in November, 1951, and (b) failed to disclose to plaintiff "that Cudworth had been hospitalized for diagnosis and that in his professional opinion the nature of Cudworth's sickness or disease was probable pulmonary tuberculosis and possible bronchogenic carcinoma".

The district judge found "that the evidence does not clearly establish in accordance with the plaintiff's burden of proof that the defendant's statement was made either with knowledge of its falsity or with a reckless disregard for its truth. As a fact essential to the plaintiff's right to recover has not been established, the plaintiff's claim must be denied." 155 F. Supp. at 250. See also *Early* v. *Eley*, 243 N.C. 695.

We cannot say that this finding of the district judge was erroneous. It is true that the hospital record does not mention pneumonia as such, and shows the diagnosis to have been "Probable Pulmonary Tuberculosis" and "Poss Bronchogenic Carcinoma". On the other hand, the tests were negative for tuberculosis, carcinoma was only suspected, and the history in the hospital record showed "infiltration right apex" and other symptoms of pneumonia. Plaintiff's

printed form did not ask the doctor to list diseases which had been shown not to exist or which were only suspected. The doctor did not know the provisions of the policy. Of course, he was bound to answer the questions honestly and with reasonable care, but plaintiff's argument that defendant was in a fiduciary relationship with plaintiff is not supported either by reason or by authority. He had no contract with plaintiff and was not making an examination to determine whether a policy should be written or renewed. Even if a fiduciary relationship had existed, it would not have eliminated the burden which rested on plaintiff to prove that defendant's statement was made either with knowledge of its falsity or with reckless disregard for its truth. We agree with the district judge that plaintiff has failed to meet that burden.

Affirmed.

Judgment of the Court of Appeals

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7586

RESERVE LIFE INSURANCE COMPANY, *Appellant*,

v.

DR. E. H. NORTH, JR., *Appellee*.

APPEAL FROM the United States District Court for the Eastern District of North Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

April 21, 1958.

MORRIS A. SOPER
United States Circuit Judge.

Opinion and Judgment of the District Court

RESERVE LIFE INSURANCE COMPANY, *Plaintiff*

v.

DR. E. H. NORTH, JR., *Defendant*.

Civ. No. 975

United States District Court, Eastern District North Carolina, Elizabeth City Division, October 17, 1957.

GILLIAM, *District Judge*.

This cause comes on to be heard upon the complaint of the Reserve Life Insurance Company, plaintiff, alleging actual damages to the extent of $1,720.22 as the result of a fraud practiced upon it by the defendant, Dr. E. H. North, Jr. Plaintiff further alleges that the fraud in question constitutes such outrageous conduct as to warrant an award of $10,000.00 punitive damages.

The facts in the case appear to be as follows:

On November 23, 1951, one John M. Cudworth was admitted to the Albemarle General Hospital as the patient of the defendant. For some time prior to his hospitalization Cudworth had complained of a chest cold, hacking cough, and fatigue. It is assumed, without deciding on the basis of the vague and conflicting evidence, that at the time of Cud-

worth's admission the defendant entered the following upon the hospital admission records under the appropriate headings:

"DIAGNOSIS AND COMPLICATIONS

"MAIN: Probable Pulmonary Tuberculosis

"SECONDARY AND ASSOCIATED: Poss Broncogenic Carcinoma"

During the period of his confinement to the hospital (November 23, 1951 to December 2, 1951), and in accordance with the defendant's instructions, Cudworth was the subject of medical treatment, tests, and laboratory analysis, the purpose of which was to determine whether he was the victim of either of the two suspected diseases or any other disease.

Cudworth was discharged from the hospital on December 2, 1951. At that time the defendant entered upon the hospital records as follows:

"12/2/1951—Patient discharged today after a negative work up for tuberculosis — all sputum, gastric washing, manitoux, and the patch test all negative. To have re-ray in 10 days, then poss broncoscopic."

On the day of Cudworth's discharge the defendant filled out for the plaintiff a Physician's Hospitalization Statement. Among others this Statement contained the following questions and answers;

"2. Nature of sickness or disease? (list all)
Pneumonia—type uncertain."

"d. To what do you attribute the cause of disease or condition? *Nothing specific.*"

Plaintiff, in reliance upon the foregoing questions and answers, paid a claim of $76.50 and subsequently renewed the policy in question.

If the defendant had answered in the aforementioned Physician's Hospitalization Statement that the nature of Cudworth's disease was probably pulmonary tuberculosis or possibly broncogenic carcinoma, or if he had stated that he attributed the cause of Cudworth's disease or condition to the same, the plaintiff, under the terms of the policy, would neither have incurred the obligation of $76.50 as a result of that confinement nor would have renewed the policy.

In the spring of 1952, subsequent to his discharge from the Albemarle General Hospital on December 2, 1951, Mr. Cudworth died as a result of carcinoma following an operation for the removal of the diseased part of the lung. Carcinoma was established as the cause of death by pathological examination subsequent to this operation. The hospital confinement preceding this terminal operation resulted in the plaintiff being sued under the terms of the renewed insurance policy with the consequent expense of $1,643.72.

The plaintiff contends that the defendant's statement to the effect that the nature of Cudworth's disease or sickness was pneumonia of an uncertain type caused by nothing specific was made with knowledge of its falsity or with a reckless disregard for its truth. Knowledge of falseness or reckless disregard for the truth is an essential element in the plaintiff's cause of action (Early v. Eley, 243 N. C. 695), for in law fraud consists of: 1. A false material representation; 2. Made with knowledge of its falseness or with a reckless disregard for its truth; 3. With the intention that the other party rely upon the same; and 4. Which is reasonably relied and acted upon by the party to his damage.

Although conflicting, the evidence suggests that the defendant suspected that Cudworth's illness upon his admission to the hospital was possibly caused by either carcinoma or tuberculosis. Upon receiving negative results from testing the patient for the same, the defendant eliminated them

in his mind as being the nature of Cudworth's illness, and this was the status of the defendant's mind at the time the Physician's Hospitalization Statement was completed.

In view of its tendency in this direction, it is the opinion of the Court that the evidence does not clearly establish in accordance with the plaintiff's burden of proof that the defendant's statement was made either with knowledge of its falsity or with a reckless disregard for its truth. As a fact essential to the plaintiff's right to recover has not been established, the plaintiff's claim must be denied.

Therefore, it is adjudged that plaintiff recover nothing and that defendant recover costs.

Order Overruling Petition for Rehearing

Filed and Entered June 13, 1958.

(Style of Court and Title Omitted.)

A petition for rehearing was filed by the appellant in the above entitled case, the Court having extended the time within which petitions for rehearing must be filed under the rules. The petition for rehearing has now been filed and has been considered by the Court and the Court is of the opinion that it raises no questions other than those already passed upon and decided against the appellant in the opinion of this Court heretofore filed.

WHEREFORE, the petition for the rehearing is hereby overruled.

June 13th, 1958.

MORRIS A. SOPER
United States Circuit Judge

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge

ROSZEL C. THOMSEN
United States District Judge